Reg. No. GR/RNP/GOA/32

RNI No. GOAENG/2002/6410

Panaji, 16th June, 2005 (Jyaistha 26, 1927)

SERIES II No. 11

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA

Department of Labour

—

Notification

No. 28/1/2004-LAB

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 28-5-2004 in reference No. IT/82/98 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Vasanti H. Parvatkar, Under Secretary (Labour).

Panaji, 1st July, 2004.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/82/98

Shri Ajay Gajanan Tari,
Ram Bhuwanwadda,
Kumbharjua-Goa. ... Workman/Party I

V/s

M/s. Polynova Industries Ltd.,
Factory 92-101,
Kundaim Industrial Estate,
Kundaim-Goa. ... Employer/Party II

Workman/Party I - Represented by Shri V. Halarnkar.

Employer/Party II - Represented by Adv. Shri P. J. Kamat.

Panaji, dated: 28-5-2004.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 7th September, 1998 bearing No. IRM/CON/P/(170)/98/10610 referred the following dispute for adjudication of this Tribunal.

> "Whether the action of the management of M/s. Polynova Industries Ltd., Kundaim, Goa, in dismissing their workman Shri Ajay G. Tari, Operator, from service with effect from 8-8-1997 is legal and justified?
>
> If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/82/98 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workman/Party I (for short, "Workman") filed his statement of claim at Exb. 5. The facts of the case in brief as pleaded by the workman are that he was employed with the Employer/Party II (for short, "Employer") in its factory situated at Kundaim Industrial Estate, Kundaim, Goa, initially as a trainee from 6-10-89 and on completion of his training period he was appointed on probation vide appointment letter dated 12-10-89 as a process operator w.e.f. 6-10-89 and was confirmed in service w.e.f. 8-4-90 vide letter dated 12th April, 1990. That the management falsely implicated him on the allegations of theft of 3 rolls of Rexine alleged to have taken place on the night of 23rd Nov., 1994 from the factory premises and he was placed under suspension vide order dated 8th December, 1994. That thereafter the charge sheet dated 2nd March, 1995 was issued to him calling for his explanation which he gave vide reply dated 14-3-95 denying the allegations made against him. That a domestic enquiry was held against him and the enquiry officer vide his report dated 7-11-96 held that 2 charges out of 4 charges were proved against him. That thereafter on the basis of the report of the Inquiry Officer a show

cause notice dated 28th Nov., 1996 was issued to him and the workman vide his reply dated 10-12-96 to the said show cause notice stated that the enquiry held against him is illegal and improper and that there was no evidence against him to prove his involvement in the incidence of theft. That thereafter the management vide letter dated 6th August, 1997 dismissed the workman from service w.e.f. 8-8-97. That on receipt of the dismissal order the workman raised an industrial dispute before the Asst. Labour Commissioner, Ponda. The management participated in the said proceedings on some occasions and since no one appeared on behalf of the management on 29-5-98 the conciliation proceedings were proceeded ex-parte and the failure report dated 24-6-98 was submitted to the Government. The workman contended that the charges made against him were false, frivolous, misconceived, concocted and without any basis. The workman contended that the charges against him were not proved in the enquiry and the findings given by the Inquiry Officer holding him guilty of the charges are baseless and perverse. The workman also contended that the enquiry conducted against him is not fair and proper. The workman claimed that his dismissal from service by the employer is illegal and unjustified and he is entitled to reinstatement in service with full back wages and other consequential benefits.

3. The employer filed written statement at Exb. 6. The employer stated that it is governed by the Industrial Employment (Standing Orders) Act, 1946 and inaccordance with the said Act it has its Certified Standing Orders and the workmen are governed by the said Certified Standing Orders with reference to their service conditions. The employer stated that on 23rd November, 1994 the workman alongwith one Vijay Kumar Naik and Mr. Shubert D'Souza were working in the 1st shift i.e. from 8.00 to 4.00 p.m. and while on duty, at about 8.20 a.m. they took away 3 rolls of rexine and kept them hidden in the bushes behind the factory near the barbed wire fence with the intention of taking them away in the night. The employer stated that the Security Personnel who were on regular patrolling noticed the said rexine and in order to catch the culprit red handed, the employer with the help of the Security Personnel set up a trap. At about 1.15 hrs. of 24-11-94 the workman along with Vijay Kumar Naik and Mr. Shubert D'Souza came to the factory on a scooter and parked it at a distance of about 300 mts. from the factory and went towards the barbed wire fencing of the factory and on reaching the said fencing, Mr. Vijay Kumar removed his shirt and shoes and entered through the barbed wire fencing so as to remove the roll of rexine while the workman and Mr. Shubert D'Souza stayed outside. That when Mr. Vijay Kumar attempted to lift the rexine, the Security Guard hit him with a danda but Mr. Vijay Kumar managed to escape and on realising that the attempt to steal was unearthed the workman and Mr. D'Souza also ran away leaving behind the scooter. The employer stated that a police complaint was made and in pursuance with the said complaint the workman and D'Souza were arrested on 30-11-94 and the police under the panchanama attached the clothes and shoes of Mr. Vijay Kumar and the scooter which was used for the theft. The employer stated that subsequently charge sheet was issued to the workman and D'Souza and a joint enquiry was conducted in which the workman fully participated. The employer stated that during the pendency of the enquiry D'Souza resigned from service and the enquiry was continued against the workman. The employer stated that on completion of the enquiry the Inquiry Officer submitted his findings holding the workman guilty of the charges on two counts. The employer stated that the copy of the findings was furnished to the workman who submitted his comments on 10-12-96 and thereafter a show cause notice was issued to the workman to which he filed his reply dated 13-6-97. The employer stated that on going through the enquiry proceedings, the findings of the Inquiry Officer past record of the workman and also considering other aggravating and extenuating circumstances the workman was dismissed from service w.e.f. 8-8-97. The employer contended that its action in dismissing the workman from service is legal and justified. The employer denied that the enquiry conducted against the workman was not fair, proper and impartial or that false, frivolous, misconceived, concocted charges were made against the workman in the charge sheet. The employer denied that charges levelled against the workman were not proved in the enquiry or that the findings of the Inquiry Officer are not based on findings on record or that they are perverse. The employer stated that since the dismissal of the workman is legal and justified, the workman is not entitled to any relief as claimed by him. The workman therefore file rejoinder at Exb. 7.

4. On the pleadings of the parties, following issues were framed at Exb. 8.

Issue No 1: Whether the Party I proves that the domestic enquiry held against him is not fair, proper and impartial ?

Issue No 2: Whether the charges of misconduct levelled against the Party I are proved to the satisfaction of the Tribunal by acceptable evidence ?

Issue No 3: Whether the Party I proves that the action of the Party II in terminating his services w.e.f. 8-8-97 is illegal and unjustified ?

Issue No 4: Whether the Party I is entitled to any relief ?

Issue No 5: What award ?

5. Since the issue Nos. 1 and 2 were relating to the enquiry conducted against the workman and proving of the charges of misconduct against him, the said issues were treated as preliminary issues and the parties led evidence on the said issues. By findings dated 5-4-2001 this Tribunal held that the domestic enquiry conducted against the workman is fair, proper and impartial. This Tribunal further held that the workman is guilty of the

charge of being involved in the theft of 3 coated textile fabric (rexine) and the same constituted misconduct under clause 26(4) and (9) of the Certified Standing Orders. Thus the issue Nos. 1 and 2 stood disposed of. Thereafter the workman as well as the employer were given opportunity to lead evidence on the remaining issues namely the issue Nos. 3 & 4. Issue No. 3 was relating to whether the action of the employer in dismissing the workman from service w.e.f. 8-8-97 is legal and justified & the issue No. 4 was relating to whether the workman was entitled to any relief. Only the workman led evidence on the above said issues by examining himself. The employer did not lead any evidence.

6. My findings on the issues are as under:

Issue No. 3: In the negative.
Issue No. 4: In the negative.
Issue No. 5: As per order below.

REASONS

7. *Issue No. 3:* The workman was dismissed from service by letter dated 6-8-97 w.e.f. 8-8-97. The said letter is in the records of the enquiry proceedings Exb. E-1 colly. As per the said letter the workman was dismissed from service by the employer after considering the findings of the Inquiry Officer holding the workman guilty of the charges of misconduct, the explanation given by the workman to the show cause notice issued to him, his past service records and the gravity of the misconduct involved. The workman had challenged the dismissal order on the ground that it is illegal and unjustified. The workman has led evidence in support of his above contention by examining himself.

8. Adv. Shri Halarnkar, the learned counsel for the workman submitted that the workman was suspended by the employer by order dated 8-12-94 but he was not paid subsistence allowance as per the Certified Standing Orders. He submitted that in view of the above, dismissal of the workman from service is liable to be set aside. In support of his contention he relied upon the judgment of the Supreme Court in the case of Jagadamba Prasad Sukla v/s State of U.P. & Others reported in AIR 2000 SC 2806. He submitted that the workman was charge sheeted by the police upon the complaint made by the employer in the court of Judicial Magistrate, First Class (JMFC), Ponda, which was registered as criminal case No. 66/S/95/D and by judgment dated 15th September, 2001 he was acquitted by the Court. He submitted that the judgment passed by the JMFC, Ponda dated 15th September, 2001 has been produced at Exb. W-1. He submitted that since the workman was acquitted in the criminal case filed against him, the dismissal order is liable to be set aside and the workman is liable to be reinstated in service. In support of his this contention he relied upon the judgment of the Supreme Court in the case of Capt. M. Paul Antony v/s Bharat Gold Mines Ltd., reported in AIR 1999 SC 1416 he submitted that the past service record of the workman was good and the same has not been considered by the employer at the time of passing the dismissal order. He submitted that the workman was not issued any memo nor he was issued any show cause notice at any time. He submitted that u/s 11A of the Industrial Disputes Act, 1947 this Tribunal has powers to interfere with the punishment awarded by the employer. He submitted that since the past service record of the workman was good and no evidence has been produced by the employer to prove the contrary and in view of the fact that the workman was acquitted in the criminal case, in any event the workman should be awarded lesser punishment rather than his dismissal from service. Adv. Shri Halarnkar submitted that the employer was bound to take into consideration the past service records of the workman before passing the dismissal order and since it was not done the employer had violated the provisions of the standing orders and hence the dismissal order stood vitiated. In support of his this contention he relied upon the judgment of the Bombay High Court in the case of Borosil Glass Works Limited v/s M.G. Chitale & Richard M. D'Souza reported in 1974 II LLJ 184.

Adv. Shri P. J. Kamat, the learned counsel for the employer submitted on the other hand that the workman had not pleaded in the claim statement that he was not paid subsistence allowance by the employer in accordance with the Certified Standing Orders during the pendency of the enquiry against him. He submitted that even otherwise the workman cannot be allowed to set up this ground of non payment of subsistence allowance in accordance with the Certified Standing Orders at this stage because this Tribunal has already given findings on the preliminary issues holding that the domestic enquiry conducted against the workman is fair and proper. He submitted that the said ground perhaps could have been relevant in deciding whether the enquiry is vitiated for non payment of proper subsistence allowance. He submitted that the acquittal of the workman in the criminal case has no bearing on the proceedings before this Tribunal. He submitted that merely because the workman is acquitted in the criminal case it does not mean that automatically the workman is entitled to get the order of dismissal set aside by this Tribunal. He submitted that the nature and scope of criminal proceedings are different from those of departmental disciplinary proceedings because in the criminal proceedings the charge has to be proved by the standard of proof beyond reasonable doubt while in departmental proceedings the standard of proof for proving the charge is preponderance of probabilities. In support of this contention he relied upon the judgment of Supreme Court in the case of Sr. Supdt. of Post Offices, Pathananphitta & others v/s A. Gopalan reported in 1999 Lab. IC 234. Adv. Shri Kamat admitted that the employer has not led any evidence to show that the past service records of the workman was not good. He however submitted that the charge which has been held to be proved against the workman is that of theft of 3 rexine rods belonging to the employer and this charge is of serious nature. He submitted that though there is no evidence on the past service record of the workman,

since the charge which is held to be proved is of serious nature, the punishment of dismissal from service is justified. He submitted that one solitary incident is enough to justify the dismissal from service if the incident is of grave and serious nature as in the present case. In support of this contention he relied upon the judgment of the Supreme Court in the case of Janata Bazaar (South Canara Central Co-op. Wholesale Stores Ltd.) Etc., v/s Secretary, Sahakari Noukarara Sangha etc., reported in 2003 CLR 568; the judgment of the Bombay High Court in the case of Podar Mills (Process House) v/s Kamlakar Ganpat Sawant reported in 2002 I CLR 387. Adv. Shri Kamat submitted that the punishment of dismissal from service awarded to the workman is legal and justified in the facts and circumstances of the case and that this Tribunal should not interfere in the said punishment.

9. The workman has raised the contention that he was placed under suspension pending enquiry and clause 28(f) of the Certified Standing Orders provides that when a workman is suspended he shall be paid subsistence allowance during the period of his suspension, wages at the rate of 50% for the first 90 days of his suspension and thereafter at the rate of 75% of the wages. The workman has contended that he was not paid subsistence allowance in terms of the above Certified Standing Orders and therefore the dismissal order which is based on the enquiry should be set aside. He has relied upon the judgment of the Supreme Court in the case of Jagdamba Prasad Shukla (supra). In this case the Supreme Court has held that the payment of subsistence allowance to an employee under suspension in accordance with the rules is not a bounty but it is a right. In the said case the employee could not attend the departmental enquiry held against him because of financial difficulties on account of non-payment of subsistence allowance. The Supreme Court held that it is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the employee to defend himself in the enquiry. The Supreme Court therefore quashed the departmental enquiry and the order of removal from service. This judgment of the Supreme Court is not applicable to the present case for more than one reason. In the present case the workman had fully participated in the enquiry held against him and had defended himself. In the course of the enquiry nor at any time thereafter the workman raised the issue that he was not paid subsistence allowance in accordance with the Certified Standing Orders. This issue is raised by the workman for the first time in the course of the arguments. When the evidence of the workman was recorded on the preliminary issues which included fairness of conducting the enquiry, the workman did not make any statement that he was not paid subsistence allowance in accordance with the Certified Standing Orders. In my findings I have held that the enquiry conducted against the workman is fair, proper and impartial. In the case of Jagdamba Prasad Shukla (supra) the employee had raised the objection regarding non payment of his subsistence allowance right from the beginning and had stated that due to lack of funds he would not be able to attend the enquiry, and infact he had not attended the enquiry. It was admitted on behalf of the employer that subsistence allowance was not paid. In the above circumstances that the Supreme Court held that there was violation of principles of natural justice on account of the denial of the reasonable opportunity to the employee to defend himself in the enquiry. This is not the case in the present case. In this case there is absolutely no evidence to prove that the workman was not paid subsistence allowance in accordance with the certified standing orders. As mentioned earlier the issue of non payment of subsistence allowance was never raised by the workman at any time. Therefore the said judgment of the Supreme Court cannot be applied to the present case. I, therefore hold that there is no substance in the contention of the workman that the dismissal order is liable to be set aside because he was not paid subsistence allowance during suspension period in accordance in Certified Standing Orders.

10. The workman has also contended that in the criminal case filed against him he is acquitted by the JMFC, Ponda by Judgment dated 15th September, 2001. His contention is that he was prosecuted for the same offence which was alleged against him in the charge sheet and since he has been acquitted by the JMFC Ponda, the dismissal order is liable to be set aside and he is liable to be reinstated in service. In support of his this contention he has relied upon the judgment of the Supreme Court in the case of Capt. M. Paul Anthony (supra). I have gone through this judgment of the Supreme Court. Nowhere in this judgment the Supreme Court has laid down the proposition that whenever there is a departmental enquiry and criminal case against an employee in respect of an offence alleged to be committed him, if the employee is acquitted in the criminal case the departmental enquiry or the punishment awarded is liable to be set aside and the employee is liable to be reinstated. In the above case after the employee was acquitted by the Court in criminal case, reinstatement was ordered by the Supreme Court in view of the peculiar facts and circumstances of that case. The main reason for ordering reinstatement was that the witnesses examined in the departmental enquiry and in the criminal case were the same and they were examined to prove the same set of facts; the court came to the conclusion that the prosecution had failed to prove the said facts and the departmental enquiry was held ex-parte against the employee. The Supreme Court in para 34 of the judgment held as follows:

> "..... In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that "the raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex-parte departmental proceedings to stand."

11. In the present case ex-parte enquiry was not conducted against the workman but the workman had

fully participated in the enquiry. In the enquiry two witnesses were examined by the employer who were the eye witnesses. Both were not examined in the criminal case but only one of them was examined. In the criminal case one of the factors which weighed in the mind of the court to acquit the workman was that the informant was not examined and as such the court held that the FIR was not proved. The court also held that the identification of the accused which was carried out was faulty and not admissible in law. It can be therefore seen that the facts in the present case are different from the one in the case of Capt. M. Paul Anthony (supra) and therefore the Judgment of the Supreme Court in that case cannot be applied to this case. Besides, the findings were given by me on 5-4-2001 holding that the enquiry is fair and proper and that the charges of misconduct are proved against the workman in the enquiry, whereas the judgment in the criminal case acquitting the workman was given by the JMFC, Ponda on 15th September, 2001 that is, much after the findings were given by me. Adv. Shri Kamat representing the employer has relied upon the judgment of the Supreme Court in the case of A. Gopalan (supra). This is also a Division Bench decision. In this case the Supreme Court referred to its earlier decision in the case of Nelson Motis v/s Union of India reported in 1992 AIR SCW 2304 wherein it was held that the nature and scope of the criminal case are very different from those of a departmental disciplinary proceedings and an order of acquittal, therefore, cannot conclude the departmental proceedings, because in a criminal case the charge has to be proved by the standard of proof beyond reasonable doubt while in departmental proceedings standard of proof for proving charge is preponderance of probabilities. The Supreme Court held that the Tribunal therefore was in error in holding that in view of the acquittal of the respondent by the criminal court on the charge relating to withdrawal of Rs. 8000/- the finding on the first charge in the departmental proceedings cannot be upheld and must be set aside. In the case of Suryabhan Popat Londhe v/s Board of Trustees of the Port of Mumbai, reported in 2003 III CLR 1049 the Industrial Tribunal had relied upon the order of acquittal passed by the Metropolitan Magistrate 16th Court Ballard Pier, Bombay, in setting aside the order of termination and in directing the reinstatement of the workman with back wages. The Bombay High Court held that having regard to the well settled position in law the acquittal of the workman in the criminal case could not have been made the basis for setting aside the order of removal from service passed in disciplinary proceedings on the basis of the evidence recorded in course of departmental enquiry. The High Court held that once there was sufficient material on record before the Inquiry Officer to sustain the charge of misconduct, the finding of misconduct could not have been interfered with on the ground of the acquittal in the criminal case. The High Court held that the basis and foundation of a criminal trial is distinct from disciplinary proceedings conducted by the employer and that the prosecution of the accused in a criminal trial is for a breach of the criminal law whereas in departmental proceedings the employer proceeds against the employee for a misconduct defined with reference to service regulation. The High Court held that the standard of proof, the mode of enquiry and the rules governing the departmental enquiry and criminal trial are entirely different. In the said case the Bombay High Court referred to the judgment of the Supreme Court in the case of Govind Das v/s State of Bihar reported in (1997) 11 SCC 361 wherein the Supreme Court held as follows:

> "We find that the acquittal of the appellant is based on the view that the charges are not proved beyond reasonable doubt. Since the standard of proof required to prove a misconduct in departmental proceedings is not the same as that required to prove a criminal charge, the acquittal of the appellant in the criminal case, in these circumstances, could not, in our opinion, be made the basis for setting aside the order for termination of the services of the appellant passed in disciplinary proceedings on the basis of evidence adduced in the departmental enquiry conducted in the charges levelled against the appellant."

12. From the above judgments it therefore follows that merely because the workman is acquitted in criminal case, the enquiry or the order of punishment cannot be set aside and he cannot be reinstated. Moreover in the present case I have already upheld the findings given by the Inquiry Officer and held that the charges of misconduct are proved against the workman. I therefore reject the contention of the workman that because he is acquitted in the criminal case, he is liable to be reinstated in services.

13. Another contention which has been raised by the workman is that while awarding the punishment of dismissal from service the employer did not consider his past service record which was required to be considered under the Certified Standing Orders of the employer. His contention is that when he was in employment he was not issued any memo or show cause notice, or any warning. His contentions is that since his past service record was good, the employer could not have dismissed him from service. He has submitted that since his past service record was not considered, the dismissal order is bad. In support of this he has relied upon the Judgment of the Bombay High Court in the case of Borosil Glass Workers Limited (supra). I have gone through the said judgment. In the said case the Bombay High Court held that the Tribunal was right in rejecting the approval application filed by the employer because the enquiry proceedings on the impugned order did not show that past service record of the employee was taken into account in awarding the punishment which was required under the standing orders 25(6) of the Model Standing Orders which applied to the employer. In my view the above judgment of the Bombay High Court cannot be applied to the present case as in the said case the Hon'ble High Court was dealing in respect of proceedings filed under Sec. 33(2)(b) of the Industrial

Disputes Act, 1947, that is the approval application filed by the employer seeking approval of the action taken, whereas in the present case the reference has been made by the Government under Sec. 10(1)(d) of the Industrial Disputes Act, 1947. The employer is entitled to lead evidence before this Tribunal to prove that the action taken against the workman is justified. Sec. 11A of the Industrial Disputes Act, 1947 empowers the Tribunal to interfere with the punishment awarded by the employer whereas the Tribunal has no powers under Sec. 33(2)(b) of the Act to interfere with the punishment awarded by the employer. It has to either grant the approval or reject the same. Therefore in my view the judgment of the Bombay High Court in the case of Borosil Glass Works Limited (Supra) cannot be applied to the present case. Even then, the order of dismissal dated 6-8-1997 issued by the employer mentions that in awarding the punishment of dismissal from service, the past service record of the workman was considered. The workman has contended that since his past service record was good, the punishment of dismissal from service could not have been awarded to him. I do not agree with this contention of the workman. It is true that no evidence has been led by the employer to prove that the past service record of the workman was not good. Only suggestion was put to the workman in his cross-examination that he was given several verbal warnings regarding performance of his duties, which suggestion he denied. No evidence has been produced by the employer to prove that the workman was given several verbal warnings. Thus there is nothing on record to show that the past service record of the workman was not good. However, in my view, the above fact by itself does not mean that the action of the employer in dismissing the workman from service is not legal and justified. The charge which has been held to be proved against the workman is that of committing theft of three coated textile fabric (rexine) belonging to the employer, valued at Rs. 5000/-. This theft was committed within the factory premises. The act of committing theft is a grave and serious offence. The employer has relied upon the judgment of the Supreme Court in the case of Janatha Bazar (Supra) and that of the Bombay High Court in the case of Podar Mills (Supra). In the case of Janatha Bazar (Supra) the Labour Court gave finding that the charges of breach of trust and misappropriation of goods were proved against the employees, however, the Labour Court directed reinstatement of the employees with 25% of back wages. The Karnataka High Court confirmed the award of the labour court. The Supreme Court however held that once act of misappropriation is proved, may be for a small or large amount, there is no question of showing uncalled for sympathy and reinstating the employees in service, and that the law on this point is wellsettled. The Supreme Court further held that in the case of proved misappropriation there is no question of considering past record and that it is the discretion of the employer to consider the same in appropriate cases, but the Labour Court cannot substitute the penalty imposed by the employer in such cases. In the case of Podar Mills (Supra) the workman was charge sheeted for having committed theft of brass pieces. The enquiry officer held that the charge of theft was proved against the workman and therefore he was dismissed from service. The Labour Court held that the enquiry was fair and that the misconduct was duly proved against the workman, but held that the punishment of dismissal was harsh and amounted to victimization and as such directed reinstatement with 50% back wages. The Industrial Court dismissed the revision application filed by the employer. The Hon'ble Single Judge of the Bombay High Court held that the Labour Court and the Industrial Court were correct in holding that the order of dismissal was disproportionate but interfered with the quantum of back wages awarded to the employee and as such reduced it to 25%. The Hon'ble Division Bench of the Bombay High Court in latters patent appeal held that the Labour Court, Industrial Court and the Hon'ble Single Judge seriously erred in reinstating the workman. The High Court held that the offence of theft having been established and proved beyond doubt, there is no question of victimization of the workman, and the leniency shown by the courts below as well as by the Hon'ble single judge seems to be misplaced. The High Court held that the workman was working as a fitter in the maintenance department and would necessarily be dealing with pieces of metal and to allow him to continue in this job would be a travesity of justice. The High Court therefore set aside the orders of the Labour Court, Industrial Court and the Hon'ble Single Judge and confirmed the order of dismissal passed by the employer. What emerges from the above judgments is that in the case of offences such as misappropriation, theft, the court should not take lenient view and if the employer imposes the punishment of dismissal from service he is justified in doing so. Further, in such cases it is the discretion of the employer to consider the past record of the workman in appropriate cases and if it is not considered it is immaterial. The Bombay High Court in the case of Sarabhai M. Chemicals (S.M. Chemicals and Electronics) reported in 1980 I LLJ 295 has held that it cannot be said that disciplinary proceedings for misconduct can never be taken against an employee on a charge of insubordination arising out of solitary instance of a lawful order and that for sustaining such a charge of insubordination several repeated mistakes of disobedience are necessary. The law which has been laid down by the Bombay High Court in the above is that to punish an employee one solitary instance of misconduct is enough. In the case of Chandrakant Patil V/s Union of India and others reported in 1995 II CLR 445 the Bombay High Court has held that past service record is required to be considered as a mitigating circumstances but it is well settled that where the diligent is guilty of serious misconduct then even one single misconduct like theft or connivance therein may warrant dismissal. The above judgment and the judgments relied upon by the employer which are discussed earlier are applicable to the present case. The workman was employed with the employer in its factory at Kundaim as an operator. The employer is engaged in the business of manufacturing different types of rexine in its factory at Kundaim. The workman was working with the employer as an operator in its factory. He had committed theft of three rolls of coated fabric (Rexine) valued at Rs. 5000/- from the factory premises. The above act on the part of the workman is a grave and serious misconduct. Therefore applying the law laid down by

the Supreme Court and the Bombay High Court in the cases referred hereinabove and in the light of what is discussed above I am of the view that the punishment of dismissal from service imposed on the workman is legal and justified and interference in the punishment awarded by the employer is not called for. I therefore hold that the workman has failed to prove that the action of the employer of dismissing him from service with effect from 8-8-1997 is illegal and unjustified. Hence I answer the issue No. 3 in the negative.

14. *Issue No. 4:* This issue pertains to the relief to which the workman is entitled to. Since it has been held by me that the dismissal of the workman from service is legal and justified, the question of granting any relief to the workman does not arise. I therefore hold that the workman is not entitled to any relief and answer the issue No. 4 in the negative.

In the circumstances, I pass the following order.

ORDER

It is hereby held that the action of the management of M/s. Polynova Industries Limited, Kundaim, Goa in dismissing their workman Shri Ajay G. Tari, Operator, from services with effect from 8-8-1997 is legal and justified. It is hereby further held that the workman Shri Ajay G. Tari, is not entitled to any relief.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Notification

No. 28/1/2004-LAB

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 01-07-2004 in reference No. IT/78/2000 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Vasanti H. Parvatkar, Under Secretary (Labour).

Panaji, 20th July, 2004.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/78/2000

Shri Sahadev B. Kolambkar,
Shri Lawa A. Shirodkar and
Shri Prashant Kawlekar,
Rep. by Goa Trade & Commercial
Workers' Union,
Velho's Building, 2nd Floor,
Panaji-Goa. ... Workman/Party I

V/s

M/s. Beverages Ventures Ltd.,
Arlem, Raia-Salcete-Goa. ... Employer/Party II.

Workmen/Party I - Represented by Adv. Shri Suhas Naik.

Employer/Party II - Represented by Adv. Shri G. B. Kamat.

Panaji, dated: 1-7-2004.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) the Government of Goa, by order dated 9th October, 2000 bearing No. IRM/CON/(96)/99/ /5000 referred the following dispute for adjudication of this Tribunal.

"(a) Whether the action of the management of M/s. Beverages Ventures Limited, Arlem, Salcete, Goa, in terminating the services of S/Shri Sahadev B. Kolambkar, Supervisor, Lawa A. Shirodkar, Jr. Accounts Officer and Prashant Kawlekar, Accounts Assistant, with effect from 21st August, 1999 is legal and justified?

(b) If not, to what relief the above three workmen are entitled ?"

2. On receipt of the reference a case was registered under No. IT/78/2000 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workman/Party I (for short, "Workmen") filed their statement of claim at Exb. 4. The facts of the case in brief as pleaded by the workmen are that they were employed with the Employer/Party II (for short, "Employer") at its factory situated at Arlem, Salcete-Goa. That they were the permanent workers of the employer and they were entitled to all the statutory benefits such as PF, ESI etc. That the employer terminated the services of the workmen in the present reference by letter dated 18-8-99 w.e.f. 21-8-99 stating that their services are terminated on account of surplusage and a certain amount was sent to them towards the settlement of their dues. That by letter dated 7-12-99 the workmen disputed the action of the employer of terminating their services as also the amount sent to them towards settlement of dues. That by said letter the workmen demanded that they may be reinstated in service with full back wages and continuity of service and further stated that they have accepted the amount sent to them, under protest. The workmen contended that the termination of their service is in contravention of the provisions of Sec. 25F of the Industrial Disputes Act, 1947 and also that the employer did not follow the

principles of 'last come first go' while retrenching their services. The workmen stated that the reasons given by the employer for terminating their services are false, fabricated and misleading. The workmen stated that the employer is running the factory in new name by making internal arrangements, in the name of Selwel Foods & Beverages Pvt. Ltd. The workmen stated that since the employer did not settle their matter a dispute was raised before the Labour Commissioner, Panaji and since no settlement could be arrived at in the conciliation proceedings, failure report was submitted to the Government by the conciliation officer. The workmen contended that termination of their service by the employer is illegal, unjustified and bad in law and therefore they are entitled to reinstatement in service with full back wages.

3. The employer filed written statement at Exb. 5. The employer stated that it is a public limited company and it was engaged in the business of marketing of soft drinks. The employer stated that it permanently closed down its business and all its establishments and from 2-6-2000 terminated the services of all its workers on payment of their legal dues. The employer stated that the services of the workman Sahadev Kolambkar were terminated on account of his unsuitability in confirmation in his post as supervisor from 13-7-99 under its written order dated 8-7-99 and the services of workman Shri Lawa Shirodkar and Shri Prashant Kawlekar were terminated on account of being found surplus in their respective categories from 21-8-99 under employer's written order dated 18-9-99 after complying with the provisions of Industrial Disputes Act, 1947. The employer denied that the termination of service of the workman is in contravention of the provisions of Sec. 25F of the Industrial Disputes Act, 1947 or that the employer has recruited new workers after the termination of service of the workmen or that the employer is running its factory in new name or that the principle of 'last come first go' was required to be followed at the time of termination of service of the workmen. The employer denied that the reasons given for terminating the services of the workmen are false or fabricated or misleading. The employer denied that the termination of service of the workmen is illegal or unjustified or bad in law or that the workmen are entitled to reinstatement in service with full back wages and continuity in service. The workmen thereafter filed rejoinder at Exb. 6.

4. On the pleadings of the parties issues were framed at Exb. 7 and thereafter the case was fixed for the evidence of the workmen. The record show that several opportunities were given to the workmen to lead evidence in the matter in support of their case that the termination of their service by the employer w.e.f. 21-8-99 is illegal and unjustified. The case was fixed for the evidence of the workmen on 21-6-2004. On the said date again adjournment was sought on behalf of the workmen. Since the record showed that several opportunities were given earlier to the workmen to lead evidence in the matter the request made on behalf of the workmen for adjournment was rejected and the evidence of the workmen was closed. Adv. Shri G. B. Kamat, representing the employer submitted that he does not want to lead evidence on behalf of the employer. In the circumstances, no evidence came to be led on behalf of the workmen as well as on behalf of the employer.

5. The Allahabad High Court in the case of V. K. Raj Industries v/s Labour Court and others reported in 1981 (29) FLR 194 has held that the proceedings before the Industrial Court are judicial in nature even though the Indian Evidence Act is not applicable to the proceedings before the Industrial Court but the principles underlying the said Act are applicable. The High Court has held that it is well settled law that if the party challenges the validity of an order, the burden lies upon him to prove the legality of the order and if no evidence is produced, the party invoking the jurisdiction must fail. The High Court has further held that if the workman fails to appear or to file written statement or to produce evidence, the dispute referred by the Government cannot be answered in favour of the workman and he would not be entitled to any reliefs. The Bombay Court, Panaji Bench, in the case of N.N.S. Engineering Services v/s Industrial Tribunal, Goa, Daman & Diu and another reported in FJR Vol. 71 at page 393 has held that the obligation to lead evidence to establish an allegation is on the party making an allegation, the test being that he who does not lead evidence must fail. The Bombay High Court further held that the provisions of Rule 10-B of the Industrial Disputes (Central) Rules, 1957 clearly indicates that the party who raises an industrial dispute is bound to prove the contentions raised by him and the Industrial Tribunal or the Labour Court would be erring in placing the burden of proof on the other party of the dispute.

6. In the present case, the dispute was referred to this Tribunal for adjudication by the Government at the instance of the Union as the Union contented that services of the workmen named in the reference were illegally terminated by the Employer. The workmen/ /union were given opportunities to lead evidence but they failed to do so. Applying the law laid down by the Allahabad High Court and the Bombay High Court in the above referred cases, the burden was on the workmen/union to prove that the action of the employer in terminating their services is illegal and unjustified. Since the workmen did not lead any evidence inspite of the opportunities given, it is evident that the workmen are not interested in pursuing with the matter and therefore, there is no material before me to hold that the action of the employer in terminating the services of the workmen S/Shri Sahadev B. Kolambkar, Supervisor, Lawa A. Shirodkar, Jr. Accounts Officer and Prashant Kawlekar, Accounts Assistant, with effect from 21st August, 1999 is illegal and unjustified. In the absence of any evidence, the reference cannot be answered in favour of the

workmen, and as such it has to be held that the termination of service of the workmen is legal and justified.

In the circumstances, I pass the following order.

ORDER

It is hereby held that the action of the management of M/s Beverage Ventures Limited Arlem, Raia, Salcete, Goa, in terminating the services of S/Shri Sahadev B. Kolambkar, Supervisor, Lawa A. Shirodkar, Jr. Accounts Officer and Prashant Kawlekar, Accounts Assistant, with effect from 21st August, 1999 is legal and justified. It is hereby further held that the workmen are not entitled to any relief.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Notification

No. 28/1/2004-LAB

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 10-6-2004 in reference No. IT/27/92 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Vasanti H. Parvatkar, Under Secretary (Labour).

Panaji, 20th July, 2004.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/27/92

Shri M. K. Pillai,
Shri C. H. Mukundan,
Shri B. B. Morais,
Shri Sam Joseph,
Shri Abramham Zakaria,
Shri Aniyan V. P. Mammon,
Shri Sukumaran C. N.,
85, Mangor Down,
Vasco-da-Gama, Goa. ... Workmen/Party I

V/s

M/s. Balraj Sud,
Chicalim,
Vasco-da-Gama, Goa. ... Employer/Party II

Workmen/Party I - Represented by Adv. Shri B. G. Kamat.

Employer/Party II - Represented by Adv. Shri A. Nigalye.

Panaji, dated: 10-6-2004.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa, by order dated 3-4-1992 bearing No. 28/31/90-LAB referred the following dispute for adjudication of this Tribunal.

"Whether the action of the management of M/s. Balraj Sud, Chicalim, Vasco-da-Gama, in terminating the services of the following workmen with effect from 1-4-1986 is legal and justified ?

(1)	Shri M. K. Pillai,	Site Engineer.
(2)	Shri C. H. Mukundan,	– do –
(3)	Shri B. B. Morais,	– do –
(4)	Shri Sam Joseph,	Purchasing Officer
(5)	Shri Abramham Zakaria,	Site Supervisor
(6)	Shri Aniyan V. P. Mammon,	– do –
(7)	Shri Sukumaran C. N.,	– do –

If not, to what relief the workmen are entitled ?"

2. On receipt of the reference a case was registered under No. IT/27/92 and registered A/D notice was issued to the parties. In pursuence to the said notice the Employer/Party II (for short, "employer") put in its appearance whereas as regards the Workmen/Party I, only the workmen Shri M. K. Pillai and Shri Sam Joseph (for short, "workmen") put in their appearence. The workmen filed their claim statement at Exb. 4. The facts of the case in brief as pleaded by the workmen are that the employer is a Partnership Firm and carries on the business of Engineers and Contractors having office at Chicalim, Vasco-da-Gama, Goa. That the workman Shri M. K. Pillai was employed from the year 1958 and was working as Site Engineer and his last drawn salary was Rs. 1300/- p.m. plus HRA and conveyance allowance. That the workman Shri Sam Joseph was employed from 1974 as Purchasing Officer cum Supervisor and his last drawn salary was Rs. 800 p.m. plus conveyance allowance on actual basis. That when the workmen reported for work on 1st April, 1986 they were told by the Managing Partner Shri Baldev Sud that the Firm is going to discontinue its business activities and hence they should seek employment elsewhere and they were further told that they need not come for work from 2nd April, 1996. That they were asked to sign resignation letters and blank vouchers which they refused to do. The workmen contended that inspite of the oral termination of service they continued to report for work for 2 or 3 months. The workmen contended that the business activities of the employer were/are continuing but the employer refused to employ them. The workmen contended that the employer terminated his services in violation of the mandatory provisions of Sec. 25F of the Industrial Disputes Act, 1947 and it is arbitrary and by way of unfair labour practice. The workmen contended that termination of their service w.e.f. 2nd April, 1986 is illegal and unjustified and therefore they are entitled to reinstatement in service with full back wages and continuity in service.

3. The employer filed written statement denying the claim made by the workmen. The employer stated that the dispute referred is not an industrial dispute within the meaning of Sec. 2(A) of the Industrial Disputes Act, 1947. The employer stated that the workmen who are the parties to the present reference are the Partners of Building Construction Firm called M/s Noble Builders and they were not the workmen or the employees of the employer. The employer stated that the relationship that existed between the workmen in the reference and the employer was that of an employer and contractor and the Government of India was the principal employer. The employer stated that the financial relationship that existed between the workmen in the reference and the employer was based on receipt of consideration by the Building Construction Firm M/s Noble Builders against the performance and completion of back to back contracts secured by the employer from the principal employer and awarded by the employer to M/s Noble Builders. The employer stated that if the employer chose not to award any further contracts to the workmen in the reference it could not tantamount to termination of service meriting industrial dispute. The employer stated that it is engaged in the business of construction of building and other allied activities for and on behalf of the Central Government and the reference made by the State Government is null and void because in relation to the employer the Central Government is appropriate Government. The employer stated that the matter between the workmen Shri C. H. Mukundan, Shri B. B. Morais, Shri Abramham Zakaria, Shri Aniyan V. P. Mammon and Shri Sukumaran C. N., was amicably settled and the employer agreed to pay certain amounts to them. The employer stated that the dispute of the above said 5 workmen was settled on 22-2-1991 and it was registered in the office of the Labour Commissioner on 7-6-91 and therefore the Government should not have included their dispute in the order of reference. The employer stated that in the year 1986 it decided not to award any contracts to M/s Noble Builders and thereafter the two partners namely the workmen Shri M.K. Pillai and Shri Sam Joseph started harassing the employer in all possible ways and Shri M. K. Pillai even went to the extent of impersonating as an Engineer of the employer thereby deliberately damaging the relationship of the employer with the clients. The employer stated that the present dispute was created by Mr. Pillai with bonafide intention to extort huge sums of money from the employer. The employer stated that the dishonest design and malafide intention of Mr. Pillai came to be known when he approached the employer and stated that if he was paid Rs. 1 lakh by demand draft and Rs. 30,000/- by cash, he would ensure that all the workmen were collectively satisfied with Rs. 30,000/- and he would get the cash withdrawn. The employer stated that all the workmen are gainfully employed and they are not entitled to any relief. Subsequently the employer amended the written statement and took the defence that the workman Shri. M. K. Pillai and Shri Sam Joseph are not workmen as defined u/s 2(s) of the Industrial Disputes Act, 1947 as they were performing the work of purely managerial, administrative and supervisory nature and were drawing remuneration exceeding the limit prescribed u/s 2(s) of the Act. The workmen thereafter filed rejoinder at Exb. 7.

4. On the pleadings of the parties, following issues were framed.

1. Whether the Party II proves that the Party I are not workmen within the meaning and scope of Sec. 2(s) of the Industrial Disputes Act, 1947 ?
2. Does the Party II prove that this Tribunal has no jurisdiction to decide the reference as the Central Government is the appropriate authority to refer the dispute and not the Government of Goa ?
3. Does the Party II proves that there is no industrial dispute and hence the present reference is not maintainable ?
4. Does the Party I prove that the action of the management of Party II in terminating the services of the workmen named in the reference w.e.f. 1-4-86 is not legal and justified ?
5. Whether the Party I is entitled to any relief ?
6. What award ?

5. My findings on the issues are as follows:

Issue No. 1: In the negative.
Issue No. 2: In the negative.
Issue No. 3: In the negative.
Issue No. 4: In the affirmative.
Issue No. 5: As per para 14 below.
Issue No. 6: As per order below.

6. Before I propose to give my findings on the issues, I would like to place certain facts on record. Though the dispute was raised on behalf of Mr. M. K. Pillai, Mr. C. H. Mukundan, Mr. B. B. Morais, Mr. Sam Joseph, Mr. Abraham Zakaria, Mr. Aniyan V. P. Mammon and Mr. Sukumaran C. N., the statement of claim was filed only on behalf of Mr. M. K. Piallai and Mr. Sam Joseph and only they participated in the proceedings. The employer stated in the written statement that the dispute between the employer and the workmen Mr. C. H. Mukundan, Mr. B. B. Morais, Mr. Abraham Zakaria, Mr. Aniyan V. P. and Mr. Sukumaran C.N. was amicably settled on 22-2 91 and they were paid the amount as mentioned in the written statement and that the said settlement was registered in the office of the Labour Commissioner, Panaji, under No. 8/1991. In the rejoinder filed on behalf of the workmen Mr. M. K. Piallai and Mr. Sam Joseph, the above statement of the employer was not denied. Therefore the statement of the employer that the dispute as regards the workmen other than Mr. M. K. Pillai and Mr. Sam Joseph was settled is liable to be believed and accepted. If their dispute was not settled they would have definitely filed the cla·m statement and participated in the proceedings. Ir. the

circumstances, I hold that the reference in respect of the workmen Mr. C. A. Mukundan, Mr. B. B. Morais, Mr. Abraham Zakaria, Mr. Aniyan V. P. and Mr. Sukumaran C. N. does not survive as the dispute between them and the employer does not exist, the same having been settled.

REASONS

7. *Issue No. 2:* This issue is taken up first because it goes to the root of the matter. This issue was framed because the employer in the written statement had contended that it is engaged in the business construction of building and other allied activities for and on behalf of the Central Government who according to the employer is the principal employer in relation to its industrial activities and therefore in relation to the industry of the employer the Central Government is the appropriate Government and not the State Government. The employer had therefore contended that the reference of the dispute made by the State Government is without authority of law and hence null and void. The burden was on the employer to prove that the Government of Goa had no authority to make the reference of the dispute. In the course of the arguments, Adv. Shri Nigalye, the learned counsel for the employer conceded that the appropriate Government in relation to the employer is the State Government i.e. the Government of Goa, and therefore the reference of the dispute made by the Government of Goa is legal, proper and valid. In view of this admission made by the learned Counsel for the employer, I hold that this Tribunal has jurisdiction to decide the reference as the Government of Goa is the appropriate authority in relation to the industry of the employer and not the Central Government. I, therefore answer the issue No. 2 in the negative.

8. *Issue No. 3:* The employer raised the contention that there is no industrial dispute and therefore the reference is not maintainable. The contention of the employer is that the workmen Shri Pillai, Shri Sam Joseph and the other workmen named in schedule of reference were not their employees or workmen and that they were the partners of the firm called "M/s Noble Builders". The contention of the employer is that the relationship that existed between them and M/s Noble Builders was that of employer and contractor and the Government of India was the principal employer. The contention of the employer is that they used to award the contract to M/s. Noble Builders of which the workmen were the partners for performance and completion of the work secured by them from the principal employer and the workmen being independent business persons and/or partners of the firm M/s Noble Builders, they have no locus standi to be identified as "Employees" or "Workmen" of the employer within the meaning of the Industrial Disputes Act, 1947 or otherwise. The contention of the employer is that if they chose not to award any further contracts to the workmen through the firm M/s Noble Builders such an act would not tantamount to termination of service leading to industrial dispute. The workmen have denied that they at any time had any dealing with the employer as partners of M/s Noble Builders.

9. Since the employer had taken a specific defence that the workmen Shri Pillai and Shri Sam Joseph alongwith the other workmen named in the order of reference were the partners of M/s Noble Builders, and that they were the Contractors for the employer and not their workmen or employees, the burden was on the employer to prove this fact. In the present case the evidence has been led only by the workmen Shri M.K. Pillai and Shri Sam Joseph by examining themselves. The employer has not led any evidence though opportunity was given. Sec. 2(k) of the Industrial Disputes Act, 1947 defines Industrial Disputes. As per the said definition industrial dispute means a dispute or difference between the employer and his workman. Unless there is employer-employee relationship there cannot be an industrial dispute and what can be referred for adjudication is only an industrial dispute. In the present case the employer has denied the employer--employee relationship between workmen Shri M. K. Pillai and Shri Sam Joseph on the one hand and the employer on the other hand. According to the employer the said workmen were the partners of M/s Noble Builders who were being awarded contracts by the employer. However, no evidence whatsoever has been produced by the employer to prove that the said workmen alongwith the other workmen named in the reference were the partners of M/s Noble Builders. The employer put only one suggestion to the workman Shri M. K. Pillai in his cross examination that he was not employed with the employer and that he was a partner of some other firm. The employer did not mention the name of the firm of which the workman was alleged to be the partner. The workman Shri Pillai denied the above suggestion put to him by the employer. Similarly only suggestion was put to the other workman Shri Sam Joseph that he was the partner of M/s Noble Builders alongwith Balraj Sud. It was never the case of the employer that Mr. Balraj Sud was the Partner of M/s Noble Builders but it was the case of the employer that the other workmen whose names are mentioned in the order of reference, that is, who have raised the dispute were the partners of M/s Noble Builders. The workman Shri Sam Joseph denied the above suggestion put to him. In the written statement the employer had stated that they rely upon the partnership deed of M/s Noble Builders, Income Tax Assessment Orders in respect of the workmen in the present reference, contract agreement entered into between M/s Noble Builders and the employer, the details of the Income Tax paid by M/s Noble Builders, books of account etc. However not a single document was produced by the employer to prove that the workmen were the partners of M/s Noble Builders and that employer used to award contract to them. I therefore hold that the employer has failed to prove that the workmen Shri M.K. Pillai and Shri Sam Joseph were the partners of M/s Noble Builders and that the employer used to award contract to the said firm. The workmen on the other hand have produced the service certificate dated 12-2-1984 Exb. W-1 issued by the employer in favour of Shri M.K. Pillai, the gates passes Exb. W-5 colly issued by MES and the requisition note

dated 7-12-1982 Exb. W-6 issued by the employer to M/s Zuari Agro Chemicals Ltd. The service certificate dated 12-2-84 Exb. W-1 is issued by the employer in favour of the workman Shri M. K. Pillai. In this certificate it is mentioned that Mr. M. K. Pillai worked as site engineer since 1958 till date at various construction sites of the employer. As per this certificate the employer admits that the workman Shri M. K. Pillai was working with the employer as Site Engineer since 1958. The employer did not dispute this certificate. Therefore the employment of the workman with the employer stands proved. Similarly the gate passes Exb. W-5 colly prove that the workman Shri Sam Joseph used to receive materials from MES on behalf of the employer. These gate passes are signed by Shri Sam Joseph in acknowledgment of the receipt of the materials on behalf of the employer. Also the requisition note dated 7-12-1982 Exb. W-6 shows that the employer had authorised Shri Sam Joseph to collect 500 cement bags on loan from Zuari Agro Chemicals Ltd., on its behalf and also to sign the loan form. The employer did not dispute the gate passes nor the requisition note. The above documents sufficiently prove that the workman Shri Sam Joseph was employed with the employer. In the circumstances, I hold that the dispute referred by the Government is an industrial dispute as defined under Sec. 2(k) of the Industrial Disputes Act, 1947, and as such the reference is maintainable. I, therefore hold that the employer has failed to prove that the dispute referred is not an industrial dispute and the reference is not maintainable and hence I answer the issue No. 3 in the negative.

10. *Issue No. 1:* The employer took the defence that assuming without admitting that the workmen Shri M.K. Pillai and Shri Sam Joseph are their employees, they are not workmen within the meaning of Sec. 2(s) of the Industrial Disputes Act, 1947, as they were performing the work of purely managerial, administrative and supervisory nature and were drawing remuneration exceeding Rs. 1600/- p.m. Since by raising this plea the employer wanted to oust the jurisdiction of this Tribunal, as per the Law laid down by the Bombay High Court in the case of R. M. Nerlekar v/s The Chief Commercial Supdt., Central Railway, Bombay reported in 1991 II CLR 789. The burden was on the employer to prove that the workmen Shri Pillai and Shri Sam Joseph were not workmen as defined under section 2(s) of the Act. In the said case the Bombay High Court has held that a party who sets up a defence of ouster of the jurisdiction of a Tribunal must prove the material requisite for supporting such a plea. Therefore the burden was on the employer to prove that the workmen Shri Pillai and Shri S. Joseph were not workmen as defined u/s 2(s) of the Industrial Disputes Act, 1947. As per Sec. 2(s) of the Industrial Disputes Act, 1947 a person who is employed mainly in a managerial or administrative capacity or a person who is employed in supervisory capacity and draws wages exceeding one thousand six hundred rupees per month is excluded from the definition of "workmen". No evidence has been led by the employer to prove that the workmen were performing managerial, administrative or supervisory work. However, the workman Shri M.K. Pillai has stated in his deposition that he joined the services of the employer as a supervisor in the year 1958 and about 3 years after his joining he started working as a Site Engineer. He has stated that as a Site Engineer he was recording the attendance of the labourers, maintain attendance register, issue materials to the labourers for work, show the work according to the drawings, get the work done properly from the labourers, show the work done to the concerned engineers for their satisfaction, attend to all the problems which would arise at the worksite. He has stated that he was working under the supervision of Mr. Balraj Sud, the Managing Partner of the employer. The Bombay High Court in the case of Ramesh Ramrao Wase v/s The Commissioner, Revenue Division, Amravati, reported in 1996 I LLJ 55 has held that if the supervision is required to be made over the quality of work and over the other aspects such as to see and examine whether the work is complete or not in satisfactory manner that also becomes the supervisory work. The High Court in that case held that even if the petitioner was required to do the work as per the instructions of the Block Development Officer or Deputy Engineer, that does not give him the character of a workman. The High Court held that the term "supervisory work" does not mean that the concerned should have the power to sanction leave, give promotions etc., as it is only one of the facts of the supervisory work. In the case of Shrikant Vishnu Palwankar v/s Presiding Officer of First Labour Court and Ors., reported in 1992 I CLR 184, the Bombay High Court has observed that when a person is working as a supervisor, he is required to oversee the working of the Department since he is put in charge of the turnout of the department. The High Court further observed that he has to efficiently manage the men, machines and materials under his control. The judgments of the Bombay High Court in the case of Ramesh Ramrao Wase (supra) and Shrikant Vishnu Palwankar (supra) squarely apply to the present case. When the work performed by the workman Shri M.K. Pillai which is enumerated above is subjected to the above judgments of the Bombay High Court, it is evident that the duties performed by Shri M. K. Pillai were of supervisory nature. I, therefore hold that the duties which were being performed by the workman Shri M. K. Pillai were that of supervisory nature. Now the question is whether Shri M. K. Pillai was drawing wages more than Rs. 1600 p.m. He has stated in his deposition that his last drawn salary was Rs. 1300/- and he was getting other allowances. In his cross examination he stated that the employer used to give him Rs. 250/- as house allowance, about Rs. 1000/- towards scooter allowance and about Rs. 500/- towards travelling allowance, per month. He has further clarified in his cross examination that he was being paid scooter allowance and travelling allowance on actual basis, that is, he was being reimbursed towards expenses incurred by him on petrol and travelling expenses. Adv. Shri Nigalye, representing the employer has submitted that the above amounts paid to Shri Pillai are the travelling concessions and therefore they are part of the wages and thus the last

drawn wages of Shri Pillai were more than Rs. 1600/- p.m. I do not agree with the submission of Adv. Shri Nigalye. Sec. 2(rr) of the Industrial Disputes Act, 1947 defines "wages". As per the said definition allowances and travelling concession are included in wages. In the case of Shalimar Paints Ltd., v/s The Third Industrial Tribunal of West Bengal and others reported in AIR 1971 Calcutta 90 it was contended that travelling concession would include travelling expenses from the residence of the employee to the place of his work and would therefore be comprised within the term "wages" as defined under the Act. The High Court rejected this contention and held in para 21 of the judgment as follows:

> "The expression travelling concession in its ordinary connotation would refer to such cases as for example when the staff of an employer is entitled to use a car or other medium of transport maintained by a company, for carrying its employee to the place of work. All that the definition says is that when such a concession is provided by the employer either in the form of the travelling or travelling at a reduced rate it would be part of wages as understood in the Act. In my view the expression, "Travelling Concession" cannot be equated with the expenses of travelling from residence of the employee to his place of work as in the present case."

In view of the above judgment of the Calcutta High Court therefore the reimbursement of the amount to the workman Shri M.K. Pillai towards expenses incurred by him on petrol and travelling expenses every month would not be travelling concession and therefore the said amounts would not be wages as defined u/s 2(rr) of the Industrial Disputes Act, 1947. In the circumstances the wages drawn by Shri M.K. Pillai were Rs. 1550/- p.m. being remuneration of Rs. 1300/- plus house allowance of Rs. 250/- which means that his monthly wage did not exceed Rs. 1600/- and therefore though Shri M.K. Pillai performed the duties of a supervisory nature, he was covered under the term "workman" as defined under Sec. 2(s) of the Industrial Disputes Act, 1947. As regards Shri Sam Joseph, he has stated in his deposition that he joined the services of the employer in 1974 as a supervisor and his duties were to shift the site materials from one site to another to collect materials like steel, cement, GI pipes, AC sheets etc. from MES, Goa Shipyard, CPWD and deliver the same at respective sites; collect the materials like wire-nets, plywood, winding wires, books, timber etc., from vendors. He has stated that at the time of termination of his service his basic salary was Rs. 800 p.m. and besides that he was getting HRA of Rs. 200/- and reimbursement of actual expenses incurred by him on travelling. In his cross he has stated that he used to get the total amount of Rs. 450/- to 500/- in a month as reimbursement towards travelling expenses. I have already held earlier that the reimbursement of the amount towards travelling expenses is not travelling concession and therefore the amount paid to Shri Sam Joseph towards travelling expenses would not be wages as defined u/s 2(rr) of the Industrial Disputes Act, 1947. In the circumstances the last drawn wages of Shri Sam Joseph were Rs. 1000/- p.m. being Rs. 800/- as basic salary and Rs. 200/- as house rent allowance. Even if the amount of Rs. 500/- paid towards travelling expenses is considered as wages still the total amount of wages drawn by Shri Sam Joseph would come to Rs. 1500/- which is below the limit of Rs. 1600/- prescribed under the definition of "Workman". Therefore even if it is presumed that the duties performed by Shri Sam Joseph were of supervisory nature, he would fall within the definition of "workman". I therefore hold that Shri Sam Joseph is a "workman" within the meaning of Sec. 2(s) of the Industrial Disputes Act, 1947. In the circumstances, I hold that the employer has failed to prove that Shri M.K. Pillai and Shri Sam Joseph are not workmen within the meaning and scope of Sec. 2(S) of the Industrial Disputes Act, 1947. I therefore, answer the issue No. 1 in the negative.

11. Issue No. 4: It has been held by me that the employment of the workmen Shri M.K. Pillai and Shri Sam Joseph with the employer has been proved. The workmen have contended that the employer terminated their services with effect from 1-4-1986. They have stated that on 1-4-86 or at any time thereafter they were not paid their dues. The employer had taken the defence that the workmen were not their employees. However, I have held that both employer has failed to prove the same and I have held that the workmen were employed with the employer. In these circumstances the contention of the workmen that their services were terminated by the employer on 1-4-1986 and that they were not paid their legal dues at the time of termination of their service is liable to be believed. In my view termination of service of the workmen amounts to retrenchment. "Retrenchment is defined in Sec. 2(oo) of the Industrial Disputes Act, 1947. As per the said section retrenchment means termination of service of a workman otherwise than as a punishment inflicted by way of disciplinary action. In this case the termination was not as a matter of punishment inflicted by way of disciplinary action. The workmen's case also does not fall within the exceptions laid down under Sec. 2(oo) of the Industrial Disputes Act, 1947 which are (a) voluntary retirement of the workman; or (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or (c) termination of the service of a workman on the ground of continued ill health" Therefore in my view the

termination of services of the workmen amounts to retrenchment as defined under section 2(oo) of the Industrial Disputes Act, 1947.

12. Sec. 25F of the Industrial Disputes Act, 1947 lays down the procedure to be followed by the employer for retrenching the services of a workman. As per the said provision the services of a workman who is in continuous service for not less than one year cannot be retrenched unless he has been given one month's notice or paid wages in lieu of such notice and he has been paid compensation at the rate of 15 days average wages per each completed year of continuous service or any part thereof in excess of six months. The above conditions are conditions precedent to retrenchment. Sec. 25-B(2) of the Industrial Disputes Act, 1947 defines, "Continuos Service". As per the said provision a workman shall be deemed to be in continuous service under an employer for a period of one year if the workman during the period of 12 calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than 190 days in the case of a workman employed below ground in a mine and 240 days in any other case. In the present case the workman Shri M. K. Pillai has stated that he was employed with the employer from the year 1958 and the workman Shri Sam Joseph has stated that he was employed from the year 1974. Their services were terminated from 1-4-1986. Therefore both the workmen had worked with the employer for more than 240 days prior to the date of termination of service, and therefore the provisions of Sec. 25F of the Industrial Disputes Act, 1947 applied to the workmen. The Supreme Court in the case of M/s. Avon Service Production Agency Pvt. Ltd., v/s Industrial Tribunal, Hariyana, and other reported in AIR 1970 SC 170 has held that giving notice and payment of compensation is a condition precedent for valid retrenchment and failure to comply with the provisions prescribing the conditions precedent for valid retrenchment in Sec. 25F renders the order of termination invalid and inoperative. In the present case admittedly the workmen were not given one month's notice nor they were paid notice pay and retrenchment compensation. Therefore there is no compliance of Sec. 25F of the Industrial Disputes Act, 1947 from the employer. Therefore the termination of service of the workmen becomes illegal and unjustified. In the circumstances, I hold that the workmen have succeeded in proving that the termination of their service by the employer with effect from 1-4-1986 is illegal and unjustified. Hence, I answer the issue No. 4 in the affirmative.

13. *Issue No. 5:* This issue pertains to the relief to be granted to the workmen. The normal rule is that when the termination of service of a workman is held to be illegal and unjustified he should be reinstated in service with full back wages unless there are reasons which do not warranty reinstatement or full back wages. The workman Shri Sam Joseph had stated in his deposition that he does not want reinstatement in service. However, in the present case the question of granting reinstatement or back wages does not arise. This is because the workman Shri M. K. Pillai in his deposition has stated that at the time of termination of service the Managing Partner Mr. Sud had told him and to the other workmen that he was closing down the business. He has further stated that at present Mr. Balraj Sud is carrying on the business in some other name that is Popular Builders and Express Machinery and Scapeholding Pvt. Ltd. He has however not produced an evidence to prove this fact. He has admitted in his cross examination that the business of the employer is closed from 2-4-1986. Adv. Shri B. G. Kamat, representing the workmen, has contended that there is no pleading from the employer that their business is closed, and therefore the evidence besides the pleading cannot be looked into. I do not agree with this contention of Adv. Shri Kamat. The law is that the evidence which is led by a party besides the pleadings is liable to be ignored or discarded. However this principle does not apply to the present case because the closure of the business by the employer is admitted by the workman in his evidence, that is in his cross examination and therefore this evidence is liable to be accepted. It has come in the evidence of the workmen themselves that the business of the employer is closed from 2-4-1986 that is from the very next date of the termination of the services of the workmen on 1-4-1986. Also in the statement of claim the workmen have stated that Mr. Sud had told the workmen on 1-4-86 that he was going to discontinue his business activities and that they should seek employment elsewhere. This lends supports to the admission made by the workman Shri Pillai that the employer closed business from 2-4-86.

14. In the present case the provisions of Chapter VB of the Industrial Disputes Act, 1947 which deals with closure does not apply to the employer because there is no evidence that the employer was employing more than 100 workers. Therefore what is applicable is the provision of Sec. 25FFF of the said Act. As per the said provision a workman who has been in continuous service of not less than one year before the date of closure is entitled to notice and compensation in accordance with the provisions of Sec. 25F of the Act as if the workman has been retrenched. In the present case the workmen Shri M. K. Pillai and Shri Sam Joseph were employed from the year 1958 and 1974 respectively. There is no evidence that they were given break in service at any time. Their services were terminated from 1-4-1986. Therefore they were in continuous service for more than one year before the closure and hence they are entitled to compensation as provided u/s 25F of the Industrial Disputes Act, 1947. In the circumstances, I hold that the workmen Shri M. K. Pillai and Shri Sam Joseph are not entitled to reinstatement in service and/or back wages but they are entitled to closure compensation as provided u/s 25F of the Industrial Disputes Act, 1947. It has been already held by me that the dispute in respect of the other workmen namely Shri C. H. Mukundan, Shri B. B. Morais, Shri Abraham Zakaria, Shri Aniyan V. P. Memmon and Shri Sukumaran C. N. does not exist in view of the settlement of their dispute by

the employer and consequently the reference of their dispute does not survive.

Hence, I pass the following order.

ORDER

It is hereby held that the reference in respect of the workmen Shri C. H. Mukundan, Shri B. B. Morais, Shri Abraham Zakaria, Shri Aniyan V. P. Memmon and Shri Sukumaran C. N. does not survive as the dispute between them and M/s. Balraj Sud, Chicalim, Vasco-da--Gama, Goa, does not exist. It is hereby further held that the action of M/s. Balraj Sud, Chicalim, Vasco-da-Gama, in terminating the services of the workmen Shri M. K. Pillai and Sam Joseph with effect from 1-4-1986 is illegal and unjustified. M/s. Balraj Sud shall pay to the workmen Shri M. K. Pillai and Shri Sam Joseph closure compensation as provided under Sec. 25F of the Industrial Disputes Act, 1947.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Notification

No. 28/1/2004-LAB

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 06-07-2004 in reference No. IT/89/99 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Vasanti H. Parvatkar, Under Secretary (Labour).

Panaji, 20th July, 2004.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/89/99

Mrs. Felicity D'Souza,
Lotus Appartments,
F. L. Gomes Road,
Vasco-da-Gama. ... Workman/Party I

V/s

M/s. Chowgule and Co. Limited,
Chowgule House,
Mormugao Harbour,
Goa-403 803. ... Employer/Party II

Workman/Party I - Represented by Shri K. V. Nadkarni.

Employer/Party II - Represented by Adv. Shri M. S. Bandodkar.

Dated: 06-07-2004.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa, by order dated 10th August, 1999 bearing No. IRM/ /CON/VSC/(33)/1998/3869 referred the following dispute for adjudication of this Tribunal.

"(1) Whether the action of the management of M/s. Chowgule and Co. Limited, Mormugao-Goa, in terminating the services of Smt. Felicity D'Souza, with effect from 29-1-1998 is legal and justified?

If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/89/99 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workman/ /Party I (for short, "workman") filed her statement of claim at Exb. 3. The facts of the case in brief as pleaded by the workman are that she was employed with the Employer/Party II (for short, "employer") as a receptionist since 19-10-1969. That on 26-8-1997 since she was not feeling well, in the afternoon session she went home during lunch hours by keeping a message with her co-worker Shri Tendulkar that in case she feels better she will attend duty in the afternoon session. That subsequently she again telephonically informed Shri Tendulkar that she is not feeling well and as such she will not attend duty. That as per the practice followed, she availed half day leave by informing her co-worker and she also submitted her leave application on the next day, that is, immediately on reporting back for duty to regularise her absence of half day leave for afternoon session on 26-8-1997 but the said leave application was rejected by the authorities and she was deprived of the half day wages. That even though she explained to the director about her absence for half day on 26-8-1997 she was not sanctioned half day's leave and her half days' wages were deducted and thus she was penalized for remaining absent for half day due to sickness. That though she was on duty from 27-8-1997 till she proceeded on her pre-sanctioned leave she did not hear from the management about her absence issue and only when she returned back from her leave she was issued a Show Cause Notice dated 3-9-1997 asking her to show cause as to why she should not be discharged from service with one month's pay in lieu of notice. That she submitted written explanation on 7-11-1997 and thereafter she was called by the director and he demanded that she should tender written apology to the Personnel Manager stating that she rudely behaved with him, which she refused to do so as she had never misbehaved with the Personnel Manager. That though

she had to avail only half day's leave due to sickness, in the leave application she mentioned reasons for leave as personal work as she could never imagine that remaining absent for half day due to sickness would have resulted in termination of her services by way of discharge. That her services were terminated by way of discharge by letter dated 23/29/1/1998 when it was mentioned in the said letter that termination of her services by way of discharge amounts to retrenchment and as such the employer had to comply with provisions of Section 25F of the Industrial Disputes Act, 1947 which the employer did not do. The workman contended that since her discharge from service was by way of punishment the charge sheet ought to have issued to her and a domestic inquiry ought to have been held. The workman contended that the punishment awarded to her is grossly disproportionate in comparison to the misconduct alleged. The workman contended that the termination of the service by the employer with effect from 21-9-1998 is illegal and unjustified and as such she is entitled to reinstatement in service with full back wages.

3. The employer filed written statement at Exb. 4. The employer stated that the workman was employed at the Head Office as Telephone Operator-Cum-Receptionist from 11-12-1969. The employer stated that the workman was in the habit of remaining absent or leaving her place of work without taking proper sanction from her superiors. The employer stated that on 26-8-1997 she was found missing from her place of duty in the afternoon session and therefore she was marked absent for half day on 26-8-1997 itself. The employer stated that the workman submitted leave application for half day leave on 26-8-1997, on 27-8-1997 giving reasons as "domestic work". The employer stated that the said application was left by the workman in the inward mail and she also did not indicate the nature of urgency which compelled her to remain absent on 26-8-1997 without informing her superiors. The employer stated that the said leave application was forwarded to the Administrative Department by her immediate superior with a remark that the workman did not inform before proceeding on half days leave and hence sought advice. The employer stated that the workman was therefore called by the Personal Manager to find out the reason for urgency but she argued with him and stated that she had submitted her leave application. The employer stated that since there was no improvement in the attitude of the workman. Show Cause Notice dated 3-9-1997 was issued to her and in the explanation dated 3-11-1997 she for the first time stated that she was not feeling well and hence she remained absence for half day. The employer stated that since the explanation given by her was not satisfactory and as she had refused to tender written apology for her rude behaviour with the Personnel Manager, having regard to the seriousness of the misconduct and the past service record, the workman was discharged from service vide letter dated 23-29-1--1998, by giving to her a cheque towards one months wages in view of notice. The employer stated that the past service record of the workman was very bad and she had committed several misconducts many times for which she had been let off by giving advice/oral warnings as well as warnings in writing and she had assured good conduct in future. The employer denied that discharge from service amounted to retrenchment of the workman and stated that therefore the provisions of Section 25F of the Industrial Disputes Act, 1947 were not attracted. The employer denied that the punishment awarded to the workman was disproportionate to the misconduct involved. The employer denied that the termination of service of the workman by way of discharge is illegal or unjustified. The employer denied that the workman is entitled to any relief as claimed by her. The workman thereafter filed rejoinder at Exb. 5.

4. On the pleadings of the parties issues were framed at Exb. 6 and thereafter the evidence of the workman was partly recorded, that is, she was partly cross examined on behalf of the employer. At this stage the parties submitted that they are trying to arrive at an amicable settlement. On 1-7-2004 when the case was fixed for hearing the parties submitted that the dispute between them is amicably settled and they filed the terms of the settlement dated 1-7-2004 at Exb. 8 along with the application dated 1-7-2004 Exb. 9 praying for passing of the award in terms of the settlement. I have gone through the terms of the settlement which are duly signed by the parties and I am satisfied that the said terms are certainly in the interest of the workman. I therefore accept the submission made by the parties and pass the consent award in terms of the settlement dated 1-7-2004 at Exb. 8.

ORDER

1. The Workman, agrees and confirms the Short Recital of this settlement and accepts discharge of her services with effect from 29-1-1998.

2. The Employer Party II in sympathetic consideration of the request of the workman agrees to pay to the workman Rs. 2,50,000/- (Rupees two lakhs fifty thousand only) which includes payment of gratuity of Rs. 89,511.70, retrenchment compensation of Rs. 89,196.80, notice pay of Rs. 6,371.20, final settlement dues of Rs. 2,491.25 and balance amount of Rs. 62,429.05 as ex-gratia amount in full and final settlement of her claim against the Company arising out of discharge of her services from the Company.

3. Employer Party II agrees to make payment as per clause 2 above, subject to deductible Income Tax, within 15 days from the date of receipt of the award by the Hon'ble Tribunal.

4. The Workman agrees and confirms that she will not raise any dispute and/or demand monetary or otherwise against the Company before any Statutory forum or otherwise.

5. The Workman agrees and confirms that she has no claims of whatsoever nature including any claim for re-employment or any monetary claim against the Company.

6. Both the parties agree to file this settlement before this Hon'ble Tribunal requesting the Hon'ble Tribunal to pass an Award in Reference No. IT/89 of 1999 in accordance with the above consent terms.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Notification

No. 28/1/2004-LAB

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 27-7-2004 in reference No. IT/58/96 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Vasanti H. Parvatkar, Under Secretary (Labour).

Panaji, 10th August, 2004.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

No. IT/58/96

Shri Rajesh Palande,
Rep. by Petals Engineers Pvt. Ltd.,
Employees Union,
716, Betim, Bardez-Goa. ... Party I/Workman

V/s

M/s. Petals Engineers Pvt. Limited,
Kundaim Industrial Estate,
Kundaim, Ponda-Goa. ... Party II/Employer

Party I - Represented by Shri V. Sawant.

Party II - Represented by Adv. Shri M. S. Bandodkar.

Panaji, dated: 27-7-2004.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa, by order dated 1st November, 1996 bearing No. IRM/CON/PONDA/(28)/96/11799 referred the following dispute for adjudication by this Tribunal.

"Whether the action of the management of M/s. Petals Engineers Pvt. Ltd., Kundaim, in terminating the services of Shri Rajesh Palande, Miller, with effect from 9-8-1995 is legal and justified?

If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/58/96 and registered A/D notice was issued to the parties. In pursuance to the said notice, the parties put in their appearance. The Workman/Party I (for short, "Workman") filed his statement of claim at Exb. 4. The facts of the case in brief as pleaded by the workman are that he was employed with the Employer/ /Party II (for short, "Employer") from 1-3-89 as a helper and subsequently he became a Miller who is a skilled workman. That there was no union of the workers of the employer and therefore the workman took the initiative to form a trade union which was known as Petals Engineers Pvt. Ltd., Employees Union which came into existence on 10th July, 1994. That on 14th July, 1994 the employer terminated his services illegally and without justification only because he took the initiative to form the union. That the said termination was effected without holding fair and proper enquiry. That the conciliation proceedings were held and in the said conciliation proceedings the workman was reinstated and accordingly he joined the services immediately after 22-10-94. That thereafter the employer again started harassing the workman and again refused employment to him on the pretext that he remained absent from 9-5-95 when infact the workman was sick for a month from 9-5-95. That the workman came to the factory premises on 10th June, 1995 to resume duties but the employer refused to accept the medical certificates and refused to allow him to resume duties. That by letter dated 22nd August, 1995 the union complained to the Asst. Labour Commissioner, Ponda that the employer has refused employment to the workman and his services have been illegally terminated. That the conciliation proceedings held by the Asst. Labour Commissioner ended in failure. The workman contended that termination of his service by the employer is in violation of the principles of natural justice, and it amounts to unfair labour practice beside being malafided and by way of victimisation. The workman contended that the termination of his service amounts to retrenchment and the same is in violation of the provisions of Sec. 25 of the Industrial Disputes Act, 1947. The workman claims that he is entitled to reinstatement in service with full back wages.

3. The employer filed written statement at Exb. 5. The employer stated that the workman joined as a helper w.e.f. 1-8-91 and subsequently he was promoted as a miller. The employer stated that the activities of the workman in the factory were not satisfactory and he was disobeying the orders of his superiors and he was behaving rudely. The employer stated that the workman committed theft of 3 verniers costing about Rs. 10,000/- and a complaint was lodged at the Mardol Police Station on 15-7-94. The employer stated that thereafter the workman left the services raised industrial disputes before the Asst. Labour Commissioner, Ponda and that after prolonged discussions before the said

authority, a settlement was arrived at u/s 12(3) of the Industrial Disputes Act, 1947 and as per the said settlement the management agreed to reinstate the workman back in service w.e.f. the date he joined the duties. The employer stated that as per said settlement the workman was to be reinstated from the date he joined duties without continuity of his past service and accordingly he joined the services from 1-11-94. The employer stated that after joining the services the workman started remaining absent for some days in each month and from 9-5-95 he absented from duties till his services were terminated by letter dated 9-8-1995. The employer stated that the workman was asked to join duties by letter dated 10-5-95 and 13-5-95. However, the workman submitted one medical certificate of ESI Doctor and another certificate from the Doctor of the Primary Health Centre, Khed, Ratnagiri dated 8-6-95 stating that the workman was under treatment from 13-5-95 to 7-6-95. The employer stated that the workman was charge sheeted by a charge sheet dated 13-6-95 and he was suspended pending enquiry. The employer stated that an independent enquiry was conducted against the workman and the Inquiry Officer submitted his findings dated 31-7-95. The employer stated that the workman was given opportunities to participate in the enquiry but he did not do so. The employer denied that there is violation of provision of Sec. 25F of the Industrial Disputes Act, 1947. The employer denied that termination of service of the workman is illegal and unjustified. The employer denied that the workman is entitled to any relief. The workman thereafter filed rejoinder.

4. On the pleadings of the parties, issues framed at Exb. 6 and thereafter the case was fixed for recording evidence of the workman. Accordingly, the evidence of the workman was recorded and thereafter the case was fixed for recording the evidence of the employer. At this stage the parties submitted that they are trying to arrive at an amicable settlement and at the request of both parties the case was fixed on 20-7-2004 for filing the terms of settlement. Accordingly, on the said date the parties appeared and they filed the terms of settlement dated 20-7-2004 at Exb. 18. The parties prayed that consent award be passed in terms of the said settlement. I have gone through the terms of settlement which are duly signed by the parties and I am satisfied that the said terms are certainly in the interest of the workman. I therefore accept the submission made by the parties pass the consent award in terms of the settlement dated 20-7-2004 Exb. 18.

ORDER

1. It is agreed between the parties that the Employer/ /Party II M/s. Petals Engineers Pvt. Limited (hereinafter referred to as the company) shall pay to Mr. Rajesh Palande, the Party I/Workman in the reference a sum of Rs. 1,5,000/- (Rupees one lakh fifty thousand only) in full and final settlement of his entire claim arising out of the employment and reference, including any claim of encashment of leave, bonus, retrenchment compensation, notice pay, unpaid wages if any gratuity, compensatory wages for the period from 1995 onwards till date.

2. Mr. Rajesh shall accept the said amount by way of full and final settlement of all his claim and he shall have no claim of whatsoever nature including any claim of reinstatement/re-employment against the company or its any Director.

3. It is further agreed that the company shall pay the said amount of Rs. 1,50,000/- (Rupees one lakh fifty thousand only) by way of accounts payee cheque drawn on State Bank of India, Ponda branch and the workman shall acknowledge the said amount by way of receipt of the said amount, and further confirm that it satisfies all his claims as mentioned in paragraph (1) above including any claim or benefits which can be computed in terms of money, arising out of the reference or otherwise.

4. In view of the amicable settlement between the parties, it is respectfully prayed that an award be passed in terms of this settlement and the reference be disposed off accordingly.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Notification

No. 28/1/2004-LAB

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 5-8-2004 in reference No. IT/2/98 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Vasanti H. Parvatkar, Under Secretary (Labour).

Panaji, August, 2004.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/2/98

Shri Rameshchandra Sarmalkar,
Workman Rep. by
General Secretary,
Goa Union of Journalist,

P. B. No. 331,
Panaji,Goa. ... Workman/Party I

V/s

M/s. Gomantak Pvt. Ltd.,
Gomantak Bhavan,
St. Inez,
Panaji-Goa. ... Employer/Party II

Workman/Party I - Represented by Shri Ashley De Rosario the President, Goa Union of Journalists.

Employer/Party II - Represented by Adv. Shri G. K. Sardessai.

Dated: 5-8-2004.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Dispute Act, 1947 (Central Act 14 of 1947) the Government of Goa, by order dated 2-1-1998 bearing No. IRM/CON/ /(59)/97/6604 referred the following dispute for adjudication of this Tribunal.

1. Whether the action of the management of M/s. Gomantak Pvt. Ltd., St. Inez, Panaji, Goa in transferring Shri Rameshchandra Sarmalkar, Special Correspondent from Goa to New Delhi vide their order dated 1-7-1997 is legal and justified?

2. If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/2/1998 and registered A/D notice was issued to the parties. In pursuance of the said notice the parties put in their appearance. The workman/Party I (for short, "union") filed her statement of claim at Exb. 5. The facts of the case in brief as pleaded by the union are that the workman Shri Rameshchandra Sarmalkar (for short, "workman") is employed with the employer/Party II (for short "employer") since the year 1968. That he was initially appointed as a Copy Holder with effect from 6-12-1968 and thereafter as a Reporter with effect from 3-5-1969 and subsequently was promoted as a Chief Reporter of newspaper Gomantak Daily and thereafter he was promoted as a Special Correspondent with effect from 1-11-1992. That the workman has been working with the employer for the last more than 30 years and he has completed 55 years of a age and is on the verge of retirement. That by letter dated 1-7-1997 the employer sought to transfer the workman from Panaji to New Delhi with immediate effect. That by letter dated 5-7-1997 the workman replied to the said letter of the employer stating that though he has been covering assignments in other states as a Reporter and as a Chief Reporter and continued to do so as a Special Correspondent, his centre of operation remained at Panaji, Goa, throughout, which is the Head Quarter of the newspaper. That the workman is not keeping well in health and requires constant attention and care from family and he has been advised by the family doctor not to stay in extreme climate for a long period. That the workman also brought to the notice of the management that there is no office, no accommodation nor infrastructure at New Delhi and the climate at that place is extreme and rigorous and as such he requested the management to withdraw the transfer order. That since no result yielded on the exchange of correspondence between the workman and the employer, the union took up the case of the workman and sought intervention of the Labour Commissioner in the matter. That the conciliation proceedings were held by the conciliation officer but due to the adamant and unco-operative attitude of the management conciliation failed and failure report was submitted to the Government. The union set up various grounds challenging the transfer order issued to the workman. The union stated that the transfer order is illegal and unjustified. The union prayed that award be passed declaring that the order dated 1-7-1997 transferring the workman from Panaji to Delhi is illegal and unjustified. The union also prayed that the employer be directed to pay to the workman the wages from the date of transfer till the date of revocation of the transfer order.

3. The employer filed written statement at Exb. 6. By way of preliminary objections the employer stated that the issue of validity or otherwise of transfer is not an industrial dispute and hence the reference is liable to be rejected. The employer stated that the workman was deputed to Delhi especially for the coverage of political and parliamentary events as the news coverage containing the daily report and the analysis by the workman was of high caliber and his report is appreciated by the readers. The employer stated that the workman did not report for duty at Delhi and on the contrary by his letter dated 30-7-1997 made some wild and baseless allegations and thereafter raised a dispute. The employer stated that the workman agreed to report for a short duration before the Commission of Labour. The employer stated that the right to transfer an employee from one department to another or from one part of the establishment to another or from one branch to another is incidental to the managerial functions and it is an inherent power of the management which has several branches. The employer stated that the transfer of an employee is an implied condition of the contract of industrial employment. The employer stated that the transfer being a part of managerial function, it is for management to determine the time and place of transfer having regard to the exigencies of his business and when the workman is transferred in exercise of such functions, such transfer is not open to challenge any industrial adjudication. The employer therefore submitted that the transfer of the workman is legal, valid, and proper. The employer stated that merely because the workman is due to retire on the expiry of another two years of service, it has not conferred any immunity of him in the matter of posting or transfer. The employer stated that by letter dated 10-7-1997 which was the employer's reply to the letter dated 5-7-1997 of the workman, the workman was informed that he was sanctioned a special allowance of Rs. 500/- per month with effect from 1-7-1997 and that the management had

no power, any ill will or any intention of harassing him. The employer denied that the transfer of the workman is contrary to the terms and conditions of the workman or that it is illegal on the grounds mentioned at para 11 of the claim statement. The employer denied that its action is an instance of unfair labour practice or that the transfer order is issued in contravention of Sec. 9A of the Industrial Disputes Act, 1947. The employer denied that the workman is entitled to any relief as claimed by the union. The union thereafter filed rejoined at Exb. 7.

On the pleadings of the parties issues were framed at Exb. 8 and thereafter the case was fixed for the evidence of the union. Several opportunities were given to the union to lead evidence in the matter but no evidence came to be led by the union and adjournment was sought on one ground or the other. Ultimately, an application dated 18-6-2004 was filed by the union at Exb. 12 informing the inability of the union to lead evidence in the matter and in view of the said application the evidence of the union was closed by order dated 18-6-2004. Opportunity was given to the employer to lead evidence but it was submitted on behalf of the employer that the employer does not wish to lead any evidence in the matter.

5. The reference of the dispute was made by the Government at the instance of the union since the union challenged the transfer order issued to the workman Shri Rameshchandra Sarmalkar. According to the union, transfer order dated 1-7-1997 issued to the workman is illegal and unjustified. Thus, it is the union who had raised the industrial dispute. The Bombay High Court, Panaji bench in the case of V.N.S. Engg., Services V/s Industrial Tribunal, the Goa, Daman and Diu and another reported in FJR Vol. 71 at page 393 has held that the obligation to lead the evidence to establish an allegation made be a party is on the party making an allegation, the test being that he who does not lead evidence must fail. The Bombay High Court has further held that the provision of Rule 10-B of the Industrial Disputes Act which requires the party raising a dispute to file a statement of demands relating to the issues in the order of reference for adjudication within 15 days from the receipt of the order of reference and forward copies to the opposite party involved, clearly indicates that the party who raises the industrial dispute is bound to prove contention raised by him and Industrial Tribunal or Labour Court would be erring in placing the burden of proof on the other party to the dispute. In another case i.e. in the case of V. K. Raj Industries V/s Labour Court (I) and others reported in 1981 (29) FLR 194, the Allahabad High Court has held that the proceedings before the Industrial Court are judicial in nature even though the Indian Evidence Act is not applicable to the proceedings before the Industrial Court, but the principles underlaying the said Act are applicable. The High Court has further held that it is well settled that if a party challenges the validity of an order, the burden lies on him to prove illegality of the order and if no evidence is produced the party invoking the jurisdiction must fail. The High Court has also held that if the workman fails to appear or to file written statement or produce, the dispute evidence, the dispute referred by the Government cannot be answered in favour of the workman and he will not be entitled to any relief.

6. In the present case the dispute was raised by the union that the transfer order dated 1-7-1997 issued to the workman Shri Rameshchandra Sarmalkar, Special Correspondent, transferring him from Goa to New Delhi is not legal and justified. Since the reference of the dispute was made at the instance of the union, the burden was on the union to prove that the transfer order issued to the workman by the employer is not legal and justified. As mentioned earlier the union was given several opportunities to lead evidence in support of its contention that the transfer order dated 1-7-1997 issued to the workman by the employer is not legal and justified. However, no evidence came to be led on behalf of the union. Therefore there is no material before me to hold that the transfer order dated 1-7-1997 issued to the workman transferring him from Goa to New Delhi is not legal and justified. I therefore hold that the union has failed to prove that the transfer order dated 1-7-1997 issued by the employer to the workman is not legal and justified and hence reference cannot be answered in favour of the union/workman.

In the circumstances I pass the following order.

ORDER

It is hereby held that the action of the management of M/s. Gomantak Pvt. Ltd., St. Inez, Panaji, Goa, in transferring the workman Shri Rameshchandra Sarmalkar, Special Correspondent from Goa to New Delhi vide their order dated 1-7-1997 is legal and justified. It is hereby further held that the workman is not entitled to any relief.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

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